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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 CONSERVATION NORTHWEST, et al.,

11 Plaintiffs,

12 v.

13 DIRK KEMPTHORNE, in his official capacity as
14 Secretary of the United States Department of the
15 Interior, et al.,

16 Defendants.

CASE NO. C04-1331-JCC

ORDER

16 **I. INTRODUCTION**

17 This case involves the narrow question of whether this Court has the authority to review a claim
18 for unreasonable delay in implementing recovery plans under the Endangered Species Act (“ESA”). The
19 matter comes before the Court on cross motions by the parties. Plaintiffs first moved for summary
20 judgment. (Dkt. Nos. 50-51.) In their Opposition, Defendants simultaneously opposed Plaintiffs’ motion
21 and moved to dismiss for lack of subject matter jurisdiction. (Dkt. No. 57.) After considering the parties’
22 relevant submissions on the matter and determining that oral argument is unnecessary, the Court hereby
23 rules as follows.

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26 ORDER – 1

1 **II. BACKGROUND AND FACTS**

2 Once a species is listed as endangered or threatened under the ESA, the Act provides a number of
 3 mechanisms in order to bring the species back from the brink of extinction. *Fund for Animals v. Babbitt*,
 4 903 F. Supp. 96, 104 (D.D.C. 1995). One of those mechanisms is the creation of a recovery plan, which
 5 “is supposed to be a basic road map to recovery, i.e., the process that stops or reverses the decline of a
 6 species and neutralizes threats to its existence.” *Id.* Specifically, Section 4(f) of the ESA states that “[t]he
 7 Secretary shall develop and implement plans (hereinafter in this subsection referred to as ‘recovery plans’)
 8 for the conservation and survival of endangered species and threatened species listed pursuant to this
 9 section, unless he finds that such a plan will not promote the conservation of the species.” 16 U.S.C. §
 10 1533(f).

11 The Grizzly bear (*Ursus arctos horribilis*) has been listed as “threatened” throughout the lower
 12 48 states under the ESA since 1975. Amendment Listing the Grizzly Bear of the 48 Conterminous States
 13 as a Threatened Species, 40 Fed. Reg. 31734 (1975). In 1982, the U.S. Fish and Wildlife Service
 14 (“FWS”) approved the Grizzly Bear Recovery Plan for the species, and issued a revised plan in 1993.
 15 (See generally Grizzly Bear Recover Plan (1993) (AR 1473-1647).) In 1997, FWS approved a recovery
 16 plan for the North Cascades Grizzly population at issue here, which will ultimately be appended as a
 17 “Chapter” to the larger Grizzly Bear Recovery Plan. (North Cascades Grizzly Bear Recovery Chapter
 18 (AR 1648-1708).) Under the heading “Priority recovery actions recommended for the first five years” the
 19 North Cascade Grizzly Bear Recovery Chapter states:

- 20 > Develop a strategy for implementation of the North Cascades grizzly bear recovery
 chapter.
- 21 > Develop an intensive ongoing educational program to provide information about
 grizzly bears and grizzly bear recovery to the public.
- 22 > Initiate the NEPA process: 1) scoping; 2) information & education; and 3)
 documentation; to evaluate a range of alternatives to recover this population
 including the augmentation of the existing small population by placement of a small
 number of bears into the ecosystem and/or other recovery alternatives.
- 23 > Conduct an intensive research and monitoring effort to determine grizzly bear
 population size and distribution, habitat use, and home ranges in the [North
 Cascades Grizzly Bear Recovery Zone].

1 > Implement the Interagency Grizzly Bear Guidelines (IGBC 1986).

2 (*Id.* at 4-5 (AR 1652-53).)

3 It is undisputed that the North Cascades grizzly bear population is in dire straits, and it is now
4 believed that there are only between five and twenty bears remaining. (*See* June 12, 2001 FWS News
5 Release 1 (Dkt. No. 50 at 103) (noting “there are approximately 5 bears” in the North Cascades); FWS
6 Species Assessment and Listing Priority Assignment Form: North Cascades Grizzly 4 (AR Supp. 486)
7 (estimating less than twenty bears).) FWS’s own documents state that “[i]t is clear that the population is
8 far below the level necessary for viability and has a high probability of extirpation.” (North Cascade
9 Grizzly Bear Recovery Chapter 9 (AR 1658).)

10 Since the issuance of the North Cascades Grizzly Bear Recovery Plan, it is undisputed that some
11 of the plan’s terms have been put into place, including implementation of education and outreach
12 programs, the Interagency Grizzly Bear Guidelines, and certain monitoring and habitat assessment
13 activities. (*See* Pls.’ Mot. 10-15; Defs.’ Opp’n 6-7.) It is likewise undisputed that other portions of the
14 recovery plan have not been implemented, notably the institution of a transparent decisionmaking process
15 pursuant to the National Environmental Policy Act (“NEPA”). (*See, e.g.*, Pls.’ Mot 10-11; Defs.’ Opp’n
16 8.) Defendants state that “[t]o date, budget and funding constraints, the allocation of funds towards other
17 recommended priority recovery actions of the Recovery Plan, as well as competition from co-equal or
18 higher-priority recovery programs, have precluded initiation of the costly NEPA process for North
19 Cascades grizzly recovery.” (Defs.’ Opp’n 8.) Defendants have not yet proposed a date by which the
20 process will ultimately be initiated.

21 Plaintiffs argue that this failure to act is unacceptable because the NEPA process “is the heart of
22 the Plan and would allow FWS to develop and consider a range of substantive recovery alternatives
23 through a subsequent, public process.” (Pls.’ Mot. 10-11.) They therefore filed the present action seeking
24 to compel Defendants to prevent further “unreasonable delay” and to implement fully the terms of the

1 recovery plan accordingly to a proposed schedule. (*Id.* at 24.)¹ Defendants simultaneously move to
 2 dismiss for lack of subject matter jurisdiction.

3 III. ANALYSIS

4 Prior to reaching the substance of Plaintiffs' claims, the Court must be certain of its jurisdiction.
 5 Plaintiffs allege two alternative jurisdictional bases. First, Plaintiffs assert a claim directly under the citizen
 6 suit provision of the ESA. Second, Plaintiffs also allege a cause of action directly under the
 7 Administrative Procedures Act ("APA"). Where Plaintiffs assert causes of action under both the APA and
 8 the ESA, the Court "look[s] first at the ESA because it may permit [Plaintiffs] to recover their litigation
 9 costs, *see* 16 U.S.C. § 1540(g)(4), and because the APA by its terms independently authorizes review
 10 only when 'there is no other adequate remedy in a court.'" *Bennett v. Spear*, 520 U.S. 154,161-62 (1997)
 11 (citing 5 U.S.C. § 704).

12 A. Unreasonable Delay under the ESA

13 The citizen suit provision of the ESA states "any person may commence a civil suit on his own
 14 behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or
 15 duty under section 1533 of this title which is not discretionary with the Secretary." 16 U.S.C. §
 16 1540(g)(2)(C). Plaintiffs allege that the Secretary has a non-discretionary duty to implement all terms of
 17 recovery plans in a timely manner, and that the Secretary has violated that duty by unreasonably delaying
 18 the initiation of the NEPA process contained within the Grizzly Bear Recovery Plan. Thus, the threshold
 19 jurisdictional issue before this Court is whether the Secretary has a nondiscretionary duty to timely
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21 ¹ Plaintiffs' First Amended Complaint alleges three separate claims: Count One asserts a violation
 22 of Section 4(f) of the ESA; Count Two alleges a violation of Section 4(b)(3)(B)(iii) of the ESA; and
 23 Count Three asserts a violation of (4)(3)(C)(iii) of the ESA. (First Amended Compl. 21-23 (Dkt. No.
 24 29).) However, the parties only discuss the first of these claims in their cross motions. Because the parties
 25 have previously indicated that these cross motions would resolve all pending matters in this litigation and
 26 obviate the need for a trial (*see* Mot. to Continue Current Trial Date and to Set a Briefing Schedule 2
 (Dkt. No 48)), the Court considers these other two claims abandoned and dismisses them without
 prejudice.

1 implement the terms of a recovery plan.

2 The D.C. Circuit has already addressed the issue of when claims for unreasonable delay for
3 Agency action are reviewable under an analogous citizen suit provision of the Clean Air Act. *Sierra Club*
4 *v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987) (cited with approval by *Farmers Union Cent. Exchange, Inc.*
5 *v. Thomas*, 881 F.2d 757, 760 (9th Cir. 1989)). In that Case, the Sierra Club sought to compel the
6 Environmental Protection Agency (“EPA”) to conclude a specific rulemaking process, arguing that the
7 EPA had unreasonably delayed in reaching a final conclusion even though there was no date-certain
8 deadline for when this process had to be completed. After conducting an extensive analysis of the D.C.
9 Circuit’s prior decision in *NRDC v. Train*, 510 F.2d 692 (D.C. Cir. 1975), the court articulated a
10 framework for determining whether an agency had a nondiscretionary duty of timeliness under the citizen
11 suit provision of the Clean Air Act. It held that “[i]n order to impose a clear-cut nondiscretionary duty,
12 we believe that a duty of timeliness must ‘categorically mandate’ that *all* specified action be taken by a
13 date-certain deadline.” *Sierra Club*, 828 F.2d at 791 (internal footnote and alterations omitted, emphasis
14 in original). The court noted that such a date-certain deadline need “not explicitly [be] set forth in the
15 statute, if it is readily ascertainable by reference to a fixed date or event.” *Id.* at 791 n.58. This Court
16 finds the *Sierra Club* decision persuasive and notes that its holding is in line with the fundamental
17 principle of administrative law that “courts generally will defer to an agency’s construction of the statute
18 it is charged with implementing, and to the procedures it adopts for implementing that statute.” *Heckler*
19 *v. Chaney*, 470 U.S. 821, 832 (1985).

20 Applying the same standard here, Plaintiffs cannot point to any date-certain deadline by which the
21 ESA compels the Secretary to implement all of the terms of a recovery plan. Nothing in the statute
22 requires that implementation be completed by a certain date. Likewise, no deadline can be inferred from
23 other date-certain deadlines established by Congress. This stands in stark contrast to other provisions of
24 this very same act, which articulate precise deadlines by when the Secretary must act. *See, e.g.*, 16 U.S.C.
25 § 1533(b)(3)(B). Accordingly, cases cited by Plaintiffs in which courts have analyzed other portions of

1 the ESA for which there are express statutory deadlines—such as the designation of “critical habitat”
 2 which must be published “concurrently” to the listing of a species as endangered or threatened (which
 3 itself is governed by the timetable listed in 16 U.S.C. § 1533(b)(3))—are inapposite here where there are
 4 no such clear dates specified by Congress. *See Center for Biological Diversity v. Evans*, No. C04-04496
 5 WHA, 2005 WL 1514102 (N.D. Cal. 2005); *Biodiversity Legal Found. v. Norton*, 285 F. Supp.2d 1
 6 (D.D.C. 2003). Thus, even if the Secretary has a duty to implement all terms of a recovery plan in a
 7 timely manner,² this duty is a discretionary one and is unreviewable by this Court via the ESA’s citizen
 8 suit provision.

9 B. Unreasonable Delay Under the APA

10 As a general matter, the fact that there is no cause of action under the ESA does not necessarily
 11 preclude a cause of action under the APA. As the Supreme Court held:

12 No one contends (and it would not be maintainable) that the causes of action against the
 13 Secretary set forth in the ESA’s citizen-suit provision are exclusive, supplanting those
 14 provided by the APA. The APA, by its terms, provides a right to judicial review of all
 15 “final agency action for which there is no other adequate remedy in a court,” § 704, and
 16 applies universally “except to the extent that—(1) statutes preclude judicial review; or (2)
 17 agency action is committed to agency discretion by law,” § 701(a). Nothing in the ESA’s
 18 citizen-suit provision expressly precludes review under the APA, nor do we detect
 19 anything in the statutory scheme suggesting a purpose to do so. And any contention that
 20 the relevant provision of 16 U.S.C. § 1536(a)(2) is discretionary would fly in the face of
 21 its text, which uses the imperative “shall.”

22 *Bennett v. Spear*, 520 U.S. 154, 175 (1997).

23 Nevertheless, as indicated in *Bennett*, suits under the APA are precluded to the extent agency

24 ² Given the Court’s analysis above regarding the unreviewable nature of “unreasonable delay”
 25 challenges to the implementation of recovery plans, the Court need not address the separate but related
 26 question of whether the ESA creates a duty to implement all aspects of a recovery plan once it has been
 developed. The Court notes that other courts have held that recovery plans do not so require. *See Fund*
for Animals, Inc. v. Rice, 85 F.3d 535, 547 (11th Cir. 1996); *Grand Canyon Trust v. Norton*, No.
 04-CV-636PHXFJM, 2006 WL 167560 at *2-3 (D. Ariz. 2006); *Nat’l Wildlife Fed’n v. Nat’l Park*
Service, 669 F. Supp. 384 (D. Wyo. 1987) (interpreting a prior version of 16 U.S.C. § 1533(f)); *but see*
Southwest Center For Biological Diversity v. Bartel, 470 F. Supp.2d 1118, 1137 n.16 (S.D. Cal. 2006)
 (“FWS has discretion, using its expertise, to decide the content of the recovery plan; however, the ESA
 clearly requires FWS to follow through with the measures identified in recovery plans.”)

1 action is committed to agency discretion by law. 5 U.S.C. § 701(a). For the same reasons stated above
 2 regarding the discretionary nature of the time line of implementation of recovery plans under the ESA,
 3 the Court holds that this same conduct is discretionary when analyzed under the APA. Thus, the Court
 4 does not have jurisdiction to review it.

5 **III. CONCLUSION**

6 The Court is mindful of the danger of holding that the timeliness of the implementation of
 7 recovery plans is beyond the scope of judicial review because even the most well-crafted recovery plan is
 8 meaningless if it is never implemented. After all, Congress clearly indicated that “[t]he Secretary *shall*
 9 develop *and implement* plans . . . for the conservation and survival of endangered species and threatened
 10 species listed pursuant to this section, unless he finds that such a plan will not promote the conservation
 11 of the species.”³ 16 U.S.C. § 1533(f)(1) (emphasis added).

12 However, “[t]he danger that agencies may not carry out their delegated powers with sufficient
 13 vigor does not necessarily lead to the conclusion that courts are the most appropriate body to police this
 14 aspect of their performance.” *Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985). “That decision is in the
 15 first instance for Congress,” who must give courts sufficient “law to apply,” which they have not done
 16 with respect to claims of unreasonable delay in the implementation of recovery plans. *Id.*

17 Nevertheless, Congress has the ability to conduct its own oversight even when agency decisions
 18 are beyond the scope of judicial review. Perhaps in recognition of this function, the ESA provides for
 19 Congressional monitoring of recovery plan efforts in which “[t]he Secretary shall report every two years
 20 to the Committee on Environment and Public Works of the Senate and the Committee on Merchant
 21 Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement

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 23 ³ It is also noteworthy that Plaintiffs do not assert that Defendants have wholly eschewed their
 24 duties to implement provisions of the North Cascades Grizzly Bear Recovery Plan. As discussed earlier,
 25 Defendants have implemented some portions of the plan. Plaintiffs only allege that they have failed to
 26 timely implement it in its entirety, and in so doing have omitted certain key provisions.

1 recovery plans for all species listed.” 16 U.S.C. § 1533(f)(3). Given the extreme importance of these
2 recovery plans for a species on the brink of extinction, this Court expects that Congress will thoroughly
3 examine the progress (or lack thereof) on the North Cascades Grizzly Bear Recovery Plan and take any
4 necessary remedial action.

5 For now, however, it is not for this Court to second guess the Secretary’s decision regarding the
6 time line for implementation of a recovery plan where Congress has not mandated action by a specific
7 date. Accordingly, Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction is hereby
8 GRANTED and Plaintiffs’ Motion for Summary Judgment is hereby DENIED.

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10 SO ORDERED this 25th of June, 2007.

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13 John C. Coughenour
14 United States District Judge
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